No. 209

SUPPLEMENTAL RECORD

FILED
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HAROLD B. WILLEY, Clerk

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 15485
CIVIL

CHICAGO GREAT WESTERN RAILWAY COMPANY, A CORPORATION,

Appellant,

vs.

LEON SCOVIL,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF MINNESOTA.

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United States District Court,
District of Minnesota,
Third Division.

Civil
No. 2698

Leon Scovel,

Plaintiff,

vs.

Chicago Great Western Railway Company, a corporation,

Defendant.

Appearances:

Charles Hvass, Esq., Minnesota Federal Building, Minneapolis, Minnesota, attorney for plaintiff.

David Grannis, Esq., South St. Paul, Minnesota, attorney for defendant.

(Prefatory Note: Appellant failed to include in the Record the testimony taken by way of deposition and introduced in evidence of Kenneth Dobb, LaVerne Kock, Robert Stone and F. N. Scovel. The depositions were taken at the instance and request and upon written notice of appellant and although introduced as a part of the plaintiff's case the statements made in advance of the introduction of the depositions in evidence clarify the manner in which the depositions were used. It is appellee's contention that the testimony hereinafter set forth in narrative form is essential for consideration by this Court in deciding the case pursuant to Rule 10 (b) (c) of the Rules of the United States Court of Appeals for the Eighth Circuit.)

Mr. Hvass: We will first read in evidence the deposition of Kenneth Dopp. I don't think it is necessary for the reporter to take it, we have the depositions here, only those parts objected to.

The Court: Is there any objections of note here in the deposition you want me to rule on?

Mr. Hvass: I figured when Mr. Grannis asked his questions he could use this and when I asked my questions, I could use it.

Mr. Grannis: If I want to put any objections in I will do it when the answer is read. Is that agreeable?

Mr. Hvass: That's agreeable.

Mr. Grannis: And the same with Mr. Hvass.

Mr. Hvass: Yes.

Depositions of Kenneth Dopp, LaVerne Kock, Robert Stone, Neal Scovel and Leon Scovel, witnesses of lawful age, taken on behalf of the defendant in the above entitled cause, wherein Leon Scovel is the plaintiff, and Chicago Great Western Railway Company, a corporation, is the defendant, pending in the District Court of the United States for the District of Minnesota, Third Division, pursuant to notice, a copy of which is hereto attached, before Searl Hoseley, a Notary Public in and for Clayton County, Iowa, with commission filed in Buchanan County, Iowa, at the passenger depot of the Chicago Great Western Railway Company at Lamont, Iowa, on the 22nd day of April, 1955.

KENNETH DOPP, a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination by Mr. Grannis.

My name is Kenneth Dopp and I live in Oelwein, Iowa. I am a farmer and also work part time for the defendant. On June 25, 1953, I was working for defendant as a section laborer. It was a damp, rainy morning. I reported for work at our tool house in Lamont, Iowa, at a quarter after 8:00 or 8:30 a.m. There were 13 or 14 men on the section gang and Leon Scovel was the foreman.

We loaded the push car, which is a small car about 4½ to 5 feet by 6½ feet, with tools. We hooked the push car

behind the motor car and the men boarded the motor car and push car. There were probably 8 men on the motor car and the rest went on the push car.

Neal Scovel was operating the motor car and Leon Scovel was sitting on a water keg on the back end of the push car pretty close to the middle. Ralph Graves was sitting on the front part of the push car. Mr. Stone was sitting behind Graves. We were headed east from Lamont to Oneida, and an accident occurred about 2½ miles from Lamont.

The motor car was traveling east about 10 to 15 miles per hour and the first I knew of an accident was when I heard somebody holler. I looked and saw Graves dragging, hung by his elbows to the push car. I didn't see him fall. I saw Scovel get off the water keg and reach for Graves. Graves was under the push car holding onto the grab bar.

The trip had proceeded in a normal way and I do not remember any difficulty. The push car and motor car were hooked together by a coupler and two pins about 9 or 10 inches, which is the way they were always hooked. I saw Scovel fall. He was reaching for Graves and Neal Scovel started to slow the motor car down. At that time Lee thought that the motor car and push car were bumping together. That is the way it looked. He reached his hands out to grab hold of the bar of the motor car and at that time Neal started the motor car up because it looked like they were going to hit, and about that time Leon lost his balance.

I don't know at what time the motor car and push car parted. The men on the motor car jumped off and grabbed the push car to stop it. Neal stopped the motor car. I don't know how Graves and Stone were seated on the push car.

Cross Examination by Mr. Hvass.

The front end of the motor car was headed east as we left Lamont. I was sitting in the first or second seat on the south side of the motor car, which would be the right side

of the motor car. There is a bar about 16 inches to 2 feet long between the motor car and the push car.

The push car is a flat bed car with a piece of pipe at each end which is used as a handle to lift the push car. The coupler that comes from the push car runs up to the center of this pipe and there is a hole through it. The end of the draw bar fits over the bottom and top of the coupler and a pin drops through the holes in the draw bar and the hole in the coupler.

On the day of the accident a pin was placed through the draw bar both at the motor car end and the push car end. The section of track along which we were proceeding caused the push car and motor car to jump around a little bit, but not too awful bad. It was rough, but it wasn't too rough. It wasn't what I would call awful rough. The push car jumped around more than the motor car.

The push car wasn't too good. The wheels were out of alignment. I have worked for two seasons for the defendant and have seen trailer cars that were specifically used for transportation of men working on the section while I have been in Oelwein. These trailer cars have never been furnished for the section crew at Lamont. I don't know if Scovel ever asked for trailer cars, but I know he has asked for a new push car. The trailer cars have special seats on them and have handholds so the men can hang onto them as they ride. There were no places to hold onto on the push car we were using at the time of the accident. The push car consisted of strips of plank laid across a frame.

The push car shown in Plaintiff's Exhibit 1 is the same type of push car used at the time of the accident. It is approximately identical. It shows the approximate general condition of the push car.

After the accident the pin was not in the draw bar as far as I remember. It seems like the crew looked for the pin and found it, but I can't remember for sure. I remember Greene looking for it, but I don't remember if he found it. Both the front and rear pipes attached to the push car were intact after the accident.

Re-Direct Examination by Mr. Grannis.

The track at the place of the accident was like most any part of the track on the main line of the defendant. The joints were rough and kind of rough on the push car and motor car. It wouldn't have been for a train, but the car just jumps when it hits them. This is an ordinary occurrence.

We had two push cars, one fairly good one and one high wheeled one. I can't state positively if the push car in Plaintiff's Exhibit 1 was the push car used. The motor car shown in Defendant's Exhibit A is not the motor car used at the time of this accident. I don't know about the push car. The motor car had a little bigger motor and probably a little bigger car. The push car could be the same. We were going up a grade before the accident at a speed of approximately ten miles per hour. The accident happened just after we made the hill, just after we passed the crest and leveled off, about two and a half miles east of Lamont.

I worked the summer and fall, three, probably five or six months. I worked two months this summer for the defendant.

I don't know what caused the pin to come out of the coupler and I don't know when the cars parted.

LAVERNE KOCK, a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination by Mr. Grannis.

My name is LaVerne Kock. I live a mile south of Maryville. I am a farmer now engaged in farming. I worked for the defendant in June of 1953 and was working on June 25, 1953. I was a section laborer and reported for work at Lamont about 10 minutes to 8:00 in the morning. There were about ten men in the crew, including Mr. Scovel, the foreman. He directed our operations that day.

We put the motor car and push car on the track and loaded the tools. Then we started for Oneida where we were going to do some work. I sat on the south side in front on the push car. Mr. Scovel sat on the push car, but I don't know exactly where. I don't know where Graves was sitting.

It was misting out. About two and a half miles from Lamont, we had just gotten over a hill, when the accident happened. We were traveling about ten miles per hour. The first thing I knew was when someone hollered. I looked back and couldn't see any accident. I saw Lee raise up and lean over. We were starting to slow down and Lee leaned forward to hold the two cars apart.

I didn't know they were uncoupled yet. The motor car started out again. Lee lost his balance and the cars came apart.

I noticed Graves was dragging. The first time I realized the cars were apart was when I saw Scovel lose his balance. I then saw Ralph Graves was dragging, holding onto the bar of the push car.

The track was in good condition where the accident happened. I had nothing to do with the coupling, but helped load the tools. Nothing occurred from the time we left until the accident happened which was not normal so far as the usual procedure was concerned. I don't know how the coupling came uncoupled. All I know is Scovel lost his balance and fell in front of the push car. I know that the push car and motor car had parted when Scovel fell, I don't know how long before that.

The push car was in fair condition. The push car and motor car shown in Defendant's Exhibit A are similar to the ones used on the day of the accident. I think the push car is the same. I don't know if the motor car is. The coupling shown in Defendant's Exhibit A is the same manner in which the push car and motor car were hooked up the day of the accident. The pins were approximately eight to ten inches in length.

Cross Examination by Mr. Hvass.

The push car shown in Plaintiff's Exhibit 1 looks similar to the one involved in the accident. The push car shown in Defendant's Exhibit A and Plaintiff's Exhibit 1 look to be the same.

I have been to Oelwein a number of times. I have never seen the trailer cars in Oelwein. I have heard that the defendant has trailer cars for men to ride on. The cars we rode on were flat bed cars with no place to hold onto, and no seats.

The usual type of pin is the one shown in Defendant's Exhibit A. I have been working when the road master has been around and he has seen this type of pin. Neither the division engineer nor the road master has told us not to use that type of pin. I don't know how the cars were attached.

Scovel was getting the line-up when the push car and motor car were attached. He wasn't there at the time. Whoever was closest to the draw bar would insert the pin. It doesn't take any skill to insert the pin. There are two flanges on the draw bar that fit over the coupler. There is a hole in both flanges on the draw bar and in the coupler. The pin fits through these holes.

Mr. Scovel warned me at one time not to ride with my feet on the motor car when I was sitting on the push car. I took my feet off the motor car when I was warned. Mr. Scovel has warned others about sitting on the push car and putting their feet over on the motor car. The day of the accident Mr. Scovel told the men about their feet. I don't know if he told Graves personally, but I do know that Graves heard it.

We had two push cars at the time of the accident and one was left at Lamont because it is difficult to pull two push cars with a motor car. The push car left at Lamont was not in the best condition. We picked the best push car. The one selected was in better condition than the one left at Lamont.

The first I knew something was wrong was when I heard a yell. I saw Lee Scovel reach out for the motor car and at

We put the motor car and push car on the track and loaded the tools. Then we started for Oneida where we were going to do some work. I sat on the south side in front on the push car. Mr. Scovel sat on the push car, but I don't know exactly where. I don't know where Graves was sitting.

It was misting out. About two and a half miles from Lamont, we had just gotten over a hill, when the accident happened. We were traveling about ten miles per hour. The first thing I knew was when someone hollered. I looked back and couldn't see any accident. I saw Lee raise up and lean over. We were starting to slow down and Lee leaned forward to hold the two cars apart.

I didn't know they were uncoupled yet. The motor car started out again. Lee lost his balance and the cars came apart.

I noticed Graves was dragging. The first time I realized the cars were apart was when I saw Scovel lose his balance. I then saw Ralph Graves was dragging, holding onto the bar of the push car.

The track was in good condition where the accident happened. I had nothing to do with the coupling, but helped load the tools. Nothing occurred from the time we left until the accident happened which was not normal so far as the usual procedure was concerned. I don't know how the coupling came uncoupled. All I know is Scovel lost his balance and fell in front of the push car. I know that the push car and motor car had parted when Scovel fell, I don't know how long before that.

The push car was in fair condition. The push car and motor car shown in Defendant's Exhibit A are similar to the ones used on the day of the accident. I think the push car is the same. I don't know if the motor car is. The coupling shown in Defendant's Exhibit A is the same manner in which the push car and motor car were hooked up the day of the accident. The pins were approximately eight to ten inches in length.

Cross Examination by Mr. Hvass.

The push car shown in Plaintiff's Exhibit 1 looks similar to the one involved in the accident. The push car shown in Defendant's Exhibit A and Plaintiff's Exhibit 1 look to be the same.

I have been to Oelwein a number of times. I have never seen the trailer cars in Oelwein. I have heard that the defendant has trailer cars for men to ride on. The cars we rode on were flat bed cars with no place to hold onto, and no seats.

The usual type of pin is the one shown in Defendant's Exhibit A. I have been working when the road master has been around and he has seen this type of pin. Neither the division engineer nor the road master has told us not to use that type of pin. I don't know how the cars were attached.

Scovel was getting the line-up when the push car and motor car were attached. He wasn't there at the time. Whoever was closest to the draw bar would insert the pin. It doesn't take any skill to insert the pin. There are two flanges on the draw bar that fit over the coupler. There is a hole in both flanges on the draw bar and in the coupler. The pin fits through these holes.

Mr. Scovel warned me at one time not to ride with my feet on the motor car when I was sitting on the push car. I took my feet off the motor car when I was warned. Mr. Scovel has warned others about sitting on the push car and putting their feet over on the motor car. The day of the accident Mr. Scovel told the men about their feet. I don't know if he told Graves personally, but I do know that Graves heard it.

We had two push cars at the time of the accident and one was left at Lamont because it is difficult to pull two push cars with a motor car. The push car left at Lamont was not in the best condition. We picked the best push car. The one selected was in better condition than the one left at Lamont.

The first I knew something was wrong was when I heard a yell. I saw Lee Scovel reach out for the motor car and at

that time the motor car was slowing down. After I saw Scovel reach out I saw Graves under the push car with his head between the push car and the motor car. It looked to me as though Scovel was trying to keep the push car and the motor car from coming together. Just as the motor car speeded up he reached for it and he fell off the push car.

Re-Direct Examination by Mr. Grannis.

I don't know if Graves or Stone had their feet on the grab bar of the motor car when the accident happened.

ROBERT STONE, a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination by Mr. Grannis.

My name is Robert Stone. I live three and a half miles north of Lamont, Iowa. I am a carpenter and have a small farm. On June 25, 1953, I was working as a section laborer for defendant. There were 13 or 14 men on the crew. We started out from Lamont intending to work at Oneida, which is east of Lamont. We had a push car and a motor car for transporting ourselves and our equipment and tools. The cars were located at Lamont and all the men checked in around 8:00 a.m. to put them on the track to couple them and load them. I don't remember if I had anything to do with the coupling.

We boarded the push car and motor car and set out for Oneida. I was sitting on the right hand corner of the push car. I was sitting next to Graves. Scovel was sitting in back of Graves and me and where the other men were sitting on the push car I don't know. Scovel was sitting in a crouched position on a fuse box. Graves was two or three feet from me.

The track was in decent shape. We were going somewhere between 10 and 15 miles per hour. We had just come up a little incline and leveled off. We had been going

faster prior to that time but probably slowed down a little pulling the grade. The grade starts at Lamont.

I was sitting on the corner and saw Graves pitch forward. It was about the same time that I saw the cars separate. It all happened about the same time. It happened like a snap of your fingers when I saw Graves pitch forward. As he pitched forward he bumped my shoulder and I almost fell off. I kind of pulled myself back on the car. I stayed there for a minute and then jumped off the right hand side. I couldn't say definitely that I saw Scovel fall, but I did see him out of the corner of my eye. I think he was standing in a crouched position. I don't know what caused him to fall.

Cross Examination by Mr. Hvass.

I was facing east as we were going down the track. I had my legs Indian fashion under me. I imagine Graves probably had his feet over on the motor car, but I don't know for sure. We sat that way, but Scovel had warned us not to as a matter of safety. I don't remember how Graves had his feet or how I had mine.

My signature appears on Plaintiff's Exhibit 2 on the first, second, third, fourth and fifth pages.

Interposing Examination by Mr. Grannis.

I don't know whether I got a copy of it or who took it. I don't remember his name. I did not write it. I read the statement before I signed it.

(The following portion of the Exhibit was read to the jury by Mr. Hvass:)

> "I was sitting with my legs under me Indian fashion. Ralph Graves was to my left in the middle of the car with his feet on the motor car."
>
> "We were traveling about 15 miles per hour and when we reached a point about two and a half miles east of Lamont the motor car and push car came uncoupled. The end at the push car came apart. When

this happened Graves fell forward. I yelled that the cars were separated and looked back for Graves as I thought he would be coming through under the car."

Cross Examination by Mr. Hvass.

Earlier Mr. Scovel had warned the men about putting their feet on the motor car. He had told us it was unsafe. We had been warned a number of times about it. I don't recall if I had my feet on the motor car. It all happened about the same time. The push car and motor car parted and Graves pitched forward. He kind of bumped me. I didn't really fall off. I was scared and got my balance.

I think Scovel was probably reaching forward trying to keep the motor car and push car from closing on Graves. I didn't definitely see him. Graves was between the push car and the motor car as he was hanging and Scovel was afraid if they would close they would close on his head.

All of the men were experienced. Graves had been with the railroad a long time. It was not my position to tell Graves how to sit or act. I don't know how Scovel was sitting.

I have been in Oelwein a number of times. I have seen trailer cars with seats and bars running down the middle. I have seen them pulled around and a bunch of men working, but I don't know what section they were on. We have never been furnished with these cars at Lamont. The only type of cars that we have are push cars and motor cars. The motor car has a seat for the men to sit on and put their feet on it. You stay on a push car by balance. There is no bar to hold onto. There were tools on the push car and there wasn't much room for the men to sit.

We were using the customary and ordinary type of pin for the coupler. The division engineer has seen us using that type of pin and has never told us not to use it. I have seen pins used on farm machinery that have a trigger on the end of the pin which prevents it from coming out. You depress the clip at the end of the pin to pull it out of the coupler.

Re-Direct Examination by Mr. Grannis.

Scovel did not warn Graves about his feet the day of the accident, but he had previous to that.

Plaintiff's Rebuttal.

F. N. SCOVEL, a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Cross Examination by Mr. Hvass.

I had been a foreman for the defendant during the summer of 1952. We had used a larger motor car for summer work. The push car involved in the accident had been in Lamont for a number of years.

Before the accident happened, I think my father had asked for a new push car. The push car involved in the accident was not good. It could have room for repairs, but it was not exactly out of service. The wheels were worn and the deck was worn. The worn wheels caused a lot of play and side movement of the car. The worn deck has no particular effect unless it is too bad and then it is unsafe for unloading.

FILED
JUN 27 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 209

CHICAGO GREAT WESTERN RAILWAY COMPANY,
a corporation,
Petitioner,

vs.

LEON SCOVEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

DAVID L. GRANNIS
Counsel for Petitioner
GRANNIS & GRANNIS
Attorneys at Law
F. J. Schult Building
South St. Paul, Minnesota
BRYCE L. HAMILTON
Counsel for Petitioner
WINSTON, STRAWN,
SMITH & PATTERSON
First National Bank Building
Chicago, Illinois

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IN THE

Supreme Court of the United States

October Term, 1956

No. .....

CHICAGO GREAT WESTERN RAILWAY COMPANY,
a corporation,

Petitioner,

vs.

LEON SCOVEL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals, Eighth Circuit, entered in the above entitled cause on May 10, 1956.

OPINION BELOW

The opinion of the Circuit Court of Appeals, Eighth Circuit (App. "B", infra), is reported in —— F. 2d ——.

JURISDICTION

The judgment of the Circuit Court of Appeals, Eighth Circuit, was entered May 10, 1956 (App. "C", infra). The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. Section 1254 (1), App. "A", infra.

QUESTION PRESENTED

Whether the Circuit Court of Appeals, Eighth Circuit, erred in affirming the lower court's denial of defendant's motion for a directed verdict at the close of all the evidence, and in denying its motion for judgment notwithstanding the adverse verdict of the jury, on the ground that there was insufficient evidence for submission to the jury on the issue of defendant's negligence and that such negligence, if any, was the proximate cause of plaintiff's injuries.

STATUTE INVOLVED

The statutory provision involved is Section 51 of the Federal Employers' Liability Act, U.S.C., Title 45, printed in Appendix A, infra.

STATEMENT

This action was originally brought by plaintiff, Leon Stovel, against the defendant, Chicago Great Western Railway Company, in the United States District Court, District of Minnesota, Third Division, which Court had jurisdiction over said action by virtue of the Federal Employers' Liability Act, Title 45, U.S.C., Sec. 56.

At the time of the accident on June 25, 1953, out of which plaintiff's injuries arose, plaintiff was employed as a section

foreman by defendant. Shortly before the accident, which occurred about two and one-half miles east of Lamont, Iowa, plaintiff was sitting on a water keg approximately in the center of a railroad push car which was being pulled by a motor car along defendant's main line track extending between Stockton, Illinois, and Oelwein, Iowa (R. pp. 8, 12).

The morning was damp and misty (R. p. 12). The motor car, operated by plaintiff's son, Neal Scovel, was pulling the push car at a speed of about twelve to fifteen miles per hour, and had just reached the top of a slight grade (R. p. 12). In addition to plaintiff and his son, there were twelve other crew men riding on the two cars, five of whom were riding on the push car with plaintiff. Of these five, two, Mr. Graves and Mr. Stone, were sitting on the front end of the push car facing forward.

Plaintiff intended to take his crew it a spot about fifteen miles east of Lamont, Iowa, where they were going to work on the track and right-of-way. Before leaving Lamont on this particular morning, plaintiff testified he made a visual inspection of the motor and push cars in question and found them in good order and not defective (R. p. 12). The coupler connected with the push and motor cars by means of a pin bolt. (See Defendant's Exhibit A, R. p. 97) This pin bolt was approximately ten inches in length. It had no cotter pin or nut at the bottom end for the reason it could be pulled out quickly in case the cars had to be disengaged and removed from the track. The wheels on the push car were not loose and were in good working order (R. p. 15). In the locality where the alleged accident occurred, the road bed and track were well ballasted and in good condition (R. p. 11). During the twenty years plaintiff was section foreman he spent a good portion of the time working on this section of track and

was foreman when it was re-ballasted only a year before the accident.

The evidence as a whole shows that as the two cars carrying the fourteen men moved in an easterly direction out of Lamont, there was side sway and up and down motion of the cars but that it was a normal situation (R. p. 15). According to plaintiff, Ralph Graves was sitting Indian fashion, with his legs straight up in front of him, on the front end of the push car shortly before the accident occurred. There is no evidence that Graves had his feet against the motor car immediately before he fell. Plaintiff happened to glance forward and saw Mr. Graves partially under the push car hanging onto the bar across the front of it. Observing Graves so situated, plaintiff claims he stood up and stepped forward on the push car, placing his hands outward. There is no evidence that plaintiff dashed forward to rescue Graves as stated in the opinion of the Circuit Court (App. B, p. 19, infra). The push car had become disengaged and the motor car was slowing down, so plaintiff reached out for the hand rail of the motor car to keep it from coming together with the push car (R. pp. 8, 17). As he was doing this, plaintiff lost his balance and fell down between the motor and push cars. The push car passed over him and from that time on he remembers nothing else about the accident.

Plaintiff states that he does not know and did not observe whether the motor and push cars disengaged before or after Mr. Graves fell between them. *Neither plaintiff nor any witnesses could say how the accident happened or what caused him to fall.*

Plaintiff claimed the defendant was negligent in failing to furnish plaintiff with a reasonably safe place in which to work, reasonably safe equipment and, in fact, furnished him

with defective equipment, and failed to exercise ordinary and reasonable care under the circumstances then existing. Specifically, plaintiff claimed defendant's roadbed at the point of the accident was in an unsafe condition; that the push car provided plaintiff and fellow employees on the day of the accident was in a defective and unsafe condition; and that fellow employee Ralph Graves was riding contrary to defendant's rule No. 27. There was some evidence of side sway and up and down motion of the push car which was as much or more so than usual (R. pp. 10, 17, 18). There was no evidence that there was a tremendous amount of side sway nor any terrific jerk up to the time the accident occurred. There was no evidence that a ten-inch pin bolt ever worked out of a similar coupling by either side sway or up and down motion. There is evidence that the same type of coupler in use at the time of this accident is used by other railroads (R. pp. 39, 40, 41). There was, in short, no evidence from which the jury could have found that the swaying or up and down motion of the push car could have resulted in working the pin out of the coupler—contrary to the statement of the Circuit Court (App. B, p. 20, infra).

On September 22, 1955, defendant filed its notice of appeal. By order of the United States District Court, District of Minnesota, Third Division, dated October 28, 1955, the time for filing the record on appeal and for docketing same was extended to December 17, 1955. In its brief defendant assigned as error the following:

A. There was insufficient evidence for submission to the jury on the issue of defendant's negligence and that such negligence, if any, was the proximate cause of plaintiff's injuries.

B The Trial Court erred in its instructions to the jury.

C. The Trial Court erred in admitting over defendant's objections the testimony of Orville J. Smith and all evidence relating to trailer cars.

D. Plaintiff's counsel was guilty of misconduct in his final argument to the jury.

The Circuit Court of Appeals, Eighth Circuit, affirmed the judgment of the lower court, holding that the defendant was guilty of negligence in failing to exercise ordinary care to furnish plaintiff with a reasonably safe place in which to work and in failing to furnish him with reasonably safe appliances and equipment with which to work, and that such negligence was the proximate cause of the accident resulting in plaintiff's injuries (App. B, p. 21, infra). The Circuit Court declined to consider defendant's assignments of error B and C. As to defendant's assignment of error D, the Court held that there was no misconduct on the part of plaintiff's counsel in final argument to the jury.

REASONS FOR GRANTING THE WRIT

1. The principal issue is whether the Circuit Court of Appeals, Eighth Circuit, erred in refusing to reverse the United States District Court for its failure to direct a verdict in favor of defendant at the close of all the evidence or grant judgment notwithstanding the adverse verdict of the jury on the ground there was insufficient evidence for submission to the jury on the issue of defendant's negligence and that such negligence, if any, was the proximate cause of plaintiff's injuries.

This question is of the utmost importance, not only to the litigants before the Court in this instance, but also to all litigants engaged in actions arising under the Federal

Employers' Liability Act. Section 51 of that Act, Title 45 U.S.C., in substance provides that every common carrier by railroad engaged in interstate commerce shall be liable in damages to any person suffering injury while employed by such carrier where such injury results from the negligence of the common carrier or its agents.

Plaintiff had the burden of proving by a fair preponderance of the evidence that his injuries, as a result of the accident of June 25, 1953, were proximately caused by the negligence of the defendant. It is true that the Court must view the evidence in the light most favorable to the plaintiff in determining whether plaintiff has sustained his proof. Nevertheless, taking plaintiff's evidence as a whole, it is clear that there was insufficient evidence of negligence on the part of the defendant for the trial court to have submitted the case to the jury.

Plaintiff's sole proof of defendant's negligence and that such negligence was the proximate cause of plaintiff's injuries is no more than an inference arising upon other proven facts. Plaintiff at the most has shown by his evidence that there was some side sway and up and down motion of the push car; that the push car was not equipped with hand holds and seats; and that the pin bolt connecting the push car coupling with the motor car coupling did not have a nut at its bottom. Thus, the only proof of how the accident occurred was but an inference from these facts. The actual occurrence of the accident—how and why it happened—is left to mere speculation and conjecture. For this reason the case should never have been submitted by the trial court to the jury.

It is clear that the decision of the Circuit Court of Appeals in the instant case is in conflict with *Pennsylvania Railroad*

Company vs. Chamberlain (1933), 288 U. S. 333, 77 L. Ed. 819. The proven facts in the instant case give rise to two inconsistent inferences of fact: that is, did the push car and the motor car become uncoupled before or after employee Graves fell from the push car? There is equally as much evidence to support the inference that Graves fell from the front of the push car where he was seated before they became uncoupled as there is that he fell afterward. In the *Chamberlain* case, this Court held that where proven facts give equal support to each of two inconsistent inferences, judgment as a matter of law must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other before he is entitled to recover.

Moreover, the instant case is in conflict with this Court in *Moore vs. Chesapeake & Ohio Railway Co.* (1951), 340 U. S. 573, 95 L. Ed. 547. In that case plaintiff's decedent was standing on the foot board of a tender being moved by an engine. Decedent fell from the foot board and was killed. The Court (at page 550, L. Ed.) states:

> "The burden was upon petitioner to prove that decedent fell after the train stopped without warning, which was the act of negligence she charged. Her evidence showed he fell before the train stopped. The only evidence which petitioner can glean from this record to support her charge is the engineer's testimony that there was no one around the switch as the train approached it, and that he did not know whether 'they' intended to take all of the thirty-three cars out of the switch at one time, or to stop and cut off some of them. From this it is said a jury might reasonably infer that the engineer decided to make and did make an emergency stop which threw decedent from the tender. * * *
>
> "Hence, all the evidence shows is that decedent fell before the train stopped. If one does not believe the

engineer's testimony that he stopped after—indeed, because of—the fall, then there is no evidence as to when decedent fell. *There would still be a failure of proof.*

"To sustain petitioner, one would have to infer from no evidence at all that the train stopped where and when it did for no purpose at all, contrary to all good railroading practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. *Speculation cannot supply the place of proof. Galloway v. United States,* 319 U. S. 372, 395, 87 L. Ed. 1458, 1473, 63 S. Ct. 1077." (Emphasis ours)

See, also, *Gulf, Mobile & Northern Railroad Co. vs. Wells* (1928), 275 U. S. 370, 72 L. Ed. 371.

2. The decision of the United States Court of Appeals, Eighth Circuit, in the instant case is in conflict with other decisions of that same Court.

See *Henwood, Trustee, vs. Coburn, Adm.*, Eighth Circuit, 1948, 165 F. 2d 418; and *Chicago & Northwestern Railway Co. vs. Garwood* (1948), 167 F. 2d 848.

Conversely, the instant case is closely analagous to the holding of that Court in *Chicago, St. Paul, Milwaukee and Omaha Railway vs. Arnold* (1947), 160 F. 2d 1002, citing numerous cases in support thereof, which held that an employee's disregard of a specific order or of a standing rule promulgated for his safety bars recovery though the injury of the employee was due as well to the negligence of other employees of the railway company. The uncontroverted evidence is that plaintiff immediately before the accident was riding in a sitting position on a water keg about in the center of the push car and that this is contrary to the rules of the railroad for riding on push cars. (R. pp. 8, 16)

The Circuit Court in explaining and limiting the *Arnold* case, supra, states as follows in the *Garwood* opinion:

> "* * * To what was said in the Coburn case we may add that in the Arnold case there was testimony for the appellant that the injured employee's superior gave him a specific warning of the hazard with which he was confronted, amounting in effect to an express command to abandon the position which exposed him to the risk of injury. * * *"

In the instant case we have precisely that situation inasmuch as plaintiff was the section foreman, had had long years of experience with this type of push car and with the section of track along which the push car was traveling at the time of the accident. In fact, it was plaintiff's duty to maintain this track in a state of good repair. Certainly there was no one other than himself who owed plaintiff a warning as to the dangers of violating this rule No. 77 specifically prohibiting the riding on water kegs, carried on push cars and like railroad vehicles.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DAVID L. GRANNIS
Counsel for Petitioner
GRANNIS & GRANNIS
Attorneys at Law
F. J. Schult Building
South St. Paul, Minnesota
BRYCE L. HAMILTON
Counsel for Petitioner
WINSTON, STRAWN,
SMITH & PATTERSON
First National Bank Building
Chicago, Illinois

APPENDIX A

TITLE 28, U.S.C., SECTION 1254

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By a writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) * * * * *

(3) * * * * *"

TITLE 45, U.S.C., SECTION 51

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

APPENDIX B

OPINION

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15,485

Chicago Great Western Railway Company, a Corporation, Appellant,

vs.

Leon Scovel, Appellee.

Appeal from the United States District Court for the District of Minnesota.

[May 10, 1956]

David L. Grannis, Jr. (Grannis & Grannis and Luther M. Stalland were with him on the brief), for Appellant.

Charles T. Hvass (Hvass, Weisman, Peterson, King & Schwappach were with him on the brief), for Appellee.

Before GARDNER, Chief Judge, and JOHNSEN and VOGEL, Circuit Judges.

GARDNER, Chief Judge.

Appellee Leon Scovel brought this action against the Chicago Great Western Railway Company to recover damages for personal injuries suffered by him while he was in the employ of appellant. The parties will be referred to as they were designated in the trial court. At the time of receiving his injuries plaintiff was employed by defendant on its railroad, a common carrier engaged in interstate commerce, as a section foreman. In his complaint he charged defendant with negligence in the following particulars: (1) That it failed to furnish him with a reasonably safe place in which to work; (2) That it failed to furnish him with equipment that was in reasonably safe condition for the purpose for which it was to be used; (3) That it furnished him with equipment that was defective and in a state of disrepair; and (4) That it failed to exercise ordinary and reasonable care under the circumstances then existing.

Defendant by its answer denied all of the allegations of negligence contained in the complaint and alleged affirmatively that plaintiff's injuries were caused solely by his own negligence. The action was tried to the court and a jury. At the close of all the evidence defendant interposed a motion for a directed verdict on the grounds that "* * * no actionable negligence against it or any of its employees has been proved and as a matter of law appears that any injuries plaintiff received were a result of or caused proximately by his own contributory negligence." The court announced that it would reserve ruling on the motion until after verdict. The jury returned a verdict against defendant and in favor of plaintiff on all the issues. In due course the defendant moved for judgment notwithstanding the verdict, which motion the court overruled and entered judgment in favor of plaintiff and against defendant pursuant to the

verdict. Defendant has appealed from the judgment so entered and seeks reversal on substantially the following grounds: (1) There was insufficient evidence for submitting to the jury the issue of defendant's negligence and that such negligence, if any, was the proximate cause of plaintiff's injuries; (2) The trial court erred in its instructions to the jury; (3) The trial court erred in admitting over defendant's objections the testimony of Orville J. Smith and all evidence relating to trailer cars; and (4) Plaintiff's counsel was guilty of misconduct in his final argument to the jury.

Before considering the merits of defendant's contentions we shall refer to the condition of appellant's brief. Rule 11(b) of this court provides that the brief shall contain, inter alia:

> "A concise statement of the case in so far as is necessary for the court to understand and decide the points to be argued in the brief, giving the pages of the printed record where each fact stated can be found and verified. If a point relates to the admission or exclusion of evidence, the statement shall quote the evidence referred to, and any objections or other equivalent action taken relative thereto, together with the rulings of the court thereon, giving the pages of the printed record on which the quotations appear. * * * If a point relied upon relates to the giving of instructions or the refusal to give instructions requested, the statement shall quote the portions of the instructions or of the requested instructions which are referred to, the objections or exceptions taken to the giving of the instructions or to the refusal to give requested instructions and the rulings of the court thereon, and shall give the pages of the printed record on which the quotations appear."

By inadvertence or otherwise, this rule has not been complied with. So far as any attempt is made to present rulings

of the court on the admissibility of evidence, neither in the statement of the case nor in the points to be argued is to be found the evidence referred to, nor any objections or other equivalent action taken relative thereto, nor any rulings of the court thereon.

The brief is equally lacking in the essential requisites to present for review the correctness of the court's instructions. In this regard the brief is absolutely silent in the statement of the case and the points to be argued as to any quotation from "* * * the portions of the instructions or of the requested instructions which are referred to, the objections or exceptions taken to the giving of the instructions or to the refusal to give requested instructions and the rulings of the court thereon * * *." We are, at most, invited to search the record for error in this regard. In this state of the record we are warranted in disregarding these allegations of error and we shall pass them without discussing in detail the rulings complained of. We have, however, satisfied ourselves that there has been no miscarriage of justice and that no prejudicial error was committed by the trial court regarding any of these rulings now complained of.

The substantial question presented on this appeal is whether or not the court erred in not granting defendant's motion for a directed verdict interposed at the close of all the evidence or in denying his motion for judgment notwithstanding the adverse verdict of the jury.

In considering this question we must view the evidence in a light most favorable to the prevailing party and we must assume that all conflicts in the evidence have been resolved by the jury in his favor and that the evidence proves all facts which it reasonably tends to prove. The prevailing party is also entitled to the benefit of all such favorable inferences

as may reasonably be drawn from the evidence. If, when so considered, reasonable minds might reach different conclusions then the case presents issues of fact to be submitted to the jury and not issues of law to be determined by the court. *Lowden v. Hanson*, 8 Cir., 134 F. 2d 348; *Carter Carburetor Corp. v. Riley*, 8 Cir., 186 F. 2d 148; *Chicago, Rock Island & Pacific Railroad Co. v. Lint*, 8 Cir., 217 F. 2d 279; *Gunning v. Cooley*, 281 U. S. 90.

With this rule in mind we turn to a consideration of the evidence. At the time of the accident plaintiff was employed by the defendant as a section foreman. He was a man of wide experience in the work of maintaining railway physical structures, including the roadbed, ballast, ties and rails. As section foreman he was in charge of a crew of thirteen workmen. They were furnished for use in transporting themselves, their necessary tools, and at times material, two cars, one designated as a motor car and the other as a push car. The push car was attached to the rear end of the motor car by means of a metal coupler with a flange at each end, one end of which fitted onto a protruding member at the back end of the motor car and the other end of which fitted onto a protruding member on the front end of the push car. There was a hole through the flanges and through the protruding members, and through this hole was fitted a pin or bolt about eight or ten inches in length so that there were two bolts in this completed coupling. The bolts had no nut nor other means of holding them in place but they had a head at the top and could not slip through the hole provided. The motor car was propelled by a gasoline engine and was equipped with seats to accommodate eight workmen. The push car had a flat board floor with no railing or seats of any kind for

the accommodation of workmen. It had metal hand holds for the purpose of enabling workmen to remove it from the tracks.

On the morning in question plaintiff with a crew of thirteen men, eight of whom were on the motor car and five of whom were on the push car, started east on defendant's railroad from the town of Lamont, Iowa, proceeding toward a portion of the track and right of way which they were engaged in surfacing, which was a part of the duty of plaintiff and the section men composing his crew. Plaintiff and five other members of his work crew who were riding on the push car were furnished no accommodations or facilities for sitting down and dared not stand up so they sat on the flat surface with folded legs, referred to in the record as Indian fashion. Plaintiff was sitting on a keg in about the middle of the flat surface of the push car and one of the section men was sitting on the front end of the push car with his feet against the motor car. While thus proceeding at a rate of from ten to fifteen miles per hour one of the coupling pins in some manner not definitely known worked out of the coupling. When this happened the push car slackened its speed leaving a space between it and the motor car. This apparently unbalanced the workman who had his feet against the motor car and he fell forward and grabbed the bar across the front end of the push car, his head forward and his face upward. While in this perilous situation the motor car slackened its speed and plaintiff, observing the danger that the motor car would come in contact with the workman's head, dashed forward to rescue him and in doing so fell in front of the push car, receiving serious injuries by being run over. There was evidence to warrant the jury in finding that the push car was an old, badly worn piece of equipment. The wheels were worn and out of alignment so that when

propelled it swayed from side to side and also up and down. There was evidence from which the jury could have found that this swaying motion and up and down motion of the push car could have resulted in working the pin out of the coupler. There was evidence that this danger could have been avoided by placing a nut at the bottom of the steel pins. There was also evidence that the plaintiff had complained to the defendant about the inadequacy and defective condition of this push car, particularly for the transportation of workmen, and there was evidence that other push cars or trailers in general use were equipped with facilities for seating the workmen being transported. There was expert testimony that the coupling device used on these cars was an unsafe device and that it was not a safe practice to require men to ride on a push car such as was involved in this accident and that there were other types of trailer cars in general use that were safe for the transportation of workmen. True, there was conflict in the evidence but as above noted we assume that all such conflicts were resolved in favor of the plaintiff.

Defendant's liability in this case must be determined under the provisions of the so-called Federal Employers' Liability Act. Under that act the railroad company is not an insurer of the safety of its employees and to entitle an employee to recover for personal injuries it is incumbent upon him to prove that his injuries resulted in whole or in part from the negligence of the carrier. 45 U.S.C.A., Section 51. It is the duty of the railroad company to exercise ordinary care to furnish the employee with a reasonably safe place in which to work and to supply him with reasonably safe appliances and equipment. This, however, is not the limit of its duty toward the employee. It is also under the continuing duty of

exercising ordinary care to see that the place where he is required to work is maintained in a reasonably safe condition and that the instrumentalities and appliances furnished for the use of the employee are reasonably fit for the intended use. *Lowden v. Hanson*, supra; *Phillips Petroleum Co. v. Manning*, 8 Cir., 81 F. 2d 849.

It is contended that the plaintiff was guilty of negligence. The Federal Employers' Liability Act, however, abolishes many of the defenses available under the common law. As said by us in *McGivern v. Northern Pacific Ry. Co.*, 8 Cir., 132 F. 2d 213:

> "The Federal Employers' Liability Act abolished certain defenses so far as common carriers engaged in Interstate Commerce are concerned, which were recognized at common law, in favor of an employer when sued for personal injuries received in the course of employment by an employee. Thus it abolished the defense embodied in the fellow servant rule; the defense of contributory negligence and the defense of assumption of risk. *Minneapolis, St. P. & S. S. M. Ry. Co. v. Rock*, 279 U. S. 410, 49 S. Ct. 363, 73 L. Ed. 766; *Moore v. Chesapeake & O. R. Co.*, 291 U. S. 205, 54 S. Ct. 402; 78 L. Ed. 755."

The question of whether or not plaintiff's injuries were proximately caused by the negligence of defendant or were caused solely by plaintiff's own negligence was clearly a question of fact to be determined by the jury and the jury's verdict is conclusive on that question. If plaintiff was contributorily negligent that in itself was not a defense but only went to the question of the amount of recovery. We are convinced that the jury under the evidence was warranted in finding the defendant guilty of negligence in that it failed to exercise ordinary care to furnish plaintiff with

a reasonably safe place in which to work and in failing to furnish him with reasonably safe appliances and equipment with which to work and that such negligence was the proximate cause of the accident resulting in plaintiff's injuries.

It remains to consider the contention that defendant was deprived of a fair trial because of the alleged misconduct of counsel for plaintiff in his argument to the jury. The particular part of the argument complained of consists of the statement by plaintiff's counsel that there was a rule of defendant railroad that an employee must go to the rescue of another employee and company property and a further statement that defendant put in contributory negligence charges to convince one or two jurors that plaintiff shouldn't get what he is entitled to.

It is argued that there was no rule of the railway company requiring an employee to go to the rescue of another employee. Whether there was or was not we think quite immaterial in the circumstances disclosed by the testimony. Plaintiff was suddenly confronted with an emergency. A fellow workman was apparently in imminent danger of death or bodily injury. In such circumstances he could not be charged with primary or contributory negligence. In fact, in cases of such emergency the employee, on his own volition, may step outside the line of his usual duties in an attempt to save himself from injury, to rescue another employee from danger or to save his employer's property. 35 Am. Jur., Master and Servant, pg. 597; *Miller v. Elgin, Joliet & Eastern Ry. Co.*, 7 Cir., 177 F. 2d 224; *Green v. Standard Wholesale Phosphate & Acid Works*, D. C., Md., 29 F. 2d 746. In 56 C. J. S., Master and Servant, pg. 1309, the rule is succintly stated as follows:

> "The law has so great a regard for human life that it will not impute negligence in an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons."

It was therefore immaterial whether counsel's remarks with reference to defendant's rules were warranted or not. Regardless of any rule of the railroad company the applicable rule was substantially that stated by counsel for plaintiff. As to the statement in counsel's argument with reference to defendant's purpose in introducing evidence of plaintiff's contributory negligence the remarks quoted do not fairly reflect what counsel said on the subject. He in fact said:

> "I don't believe there is any evidence at all of any contributory negligence on the part of Mr. Scovel. The reason why the railroad talks about contributory negligence is that under the Federal Employers' Liability Act if an employee is guilty of some negligence himself that tends, that diminishes his damages, in other words, if an employee is guilty of negligence of 10 per cent, then he only gets a 90 per cent recovery of what his damages are. So, consequently, if a railroad can convince one or two of perhaps the members of a jury that the employee himself is partly responsible for the accident, then they gain their objective in holding back from the man the compensation that he is, or that he should be entitled to under the Federal Employers' Liability Act."

When the statement is considered in its entirety it is well within the scope of legitimate advocacy. It is also to be noted that there is here no claim that the damages awarded plaintiff were the result of passion or prejudice or were excessive. We are of the view that the remarks objected to cannot be urged as prejudicial to the defendant as they were well

within the scope of the evidence and inferences that might legitimately be drawn therefrom.

The judgment appealed from is therefore affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

ADDENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,485—September Term, 1955
Thursday, May 10, 1956

Chicago Great Western Railway Company,
Appellant,

vs.

Leon Scovel,
Appellee.

Appeal from the United States District Court
for the District of Minnesota

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

May 10th, 1956

JUL 23 1956
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956

NO. 209

CHICAGO GREAT WESTERN RAILWAY COMPANY A CORPORATION,

Petitioner,

vs.

LEON SCOVEL,

Respondent.

BRIEF IN OPPOSITION

A. HAROLD PETERSON,
Counsel for Respondent.

HVASS, WEISMAN, PETERSON,
KING & SCHWAPPACH,
Attorneys at Law,
615 Minnesota Federal Building,
Minneapolis, Minnesota.

Hayward-Court Brief Printing Co., Minneapolis 15, Minn.

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In the
Supreme Court of the United States

OCTOBER TERM, 1956

NO. .....

CHICAGO GREAT WESTERN RAILWAY COMPANY A CORPORATION,

Petitioner,

VS.

LEON SCOVEL,

Respondent.

BRIEF IN OPPOSITION

STATEMENT

(The statement of facts set forth by petitioner has been prepared in a light most favorable to it from an incomplete record. The statement parallels a similar statement contained in its brief presented before the United States Court of Appeals for the Eighth Circuit. Because of the unfairness of petitioner's statement, respondent herewith sets forth his statement of facts, prepared in accordance with the rule that the record on appeal must be considered in a light favorable to the prevailing party. For purposes of clarity, petitioner will hereinafter be referred to as defendant and respondent will hereinafter be referred to as plaintiff.)

Plaintiff, Leon E. Scovel, age 48, and residing at Lamont, Iowa, was employed by defendant in its department of Maintenance of Way. His employment began in 1927, and in 1934 he was promoted to foreman, which position he held on June 25, 1953, the day of the accident (R. p. 5).

On this day, plaintiff, together with the members of his

crew, Ralph Graves, Fred Green, Gilbert Roudabush, Lavern Koch, Vincent Kock, Kenneth Dopp, Richard Cashen, Robert Stone, Lloyd Bender, Lyle Homewood, Percy Strong, Neal Scovel and Raymond Boyens, intended to go to Oneida, Iowa, for the purpose of surfacing defendant's track at that point (R. p. 6). The means of transportation furnished plaintiff and the other employees consisted of a motor car and a push car (R. p. 7). The push car was attached to the motor car by means of a draw bar, through each end of which was inserted a pin of approximately 8 inches in length. The pin extended through two holes in each end of the draw bar and a coupler attached to one end of the motor car and one end of the push car (R. p. 7).

Defendant's employees, other than plaintiff, coupled the cars together during the time the plaintiff was getting the line-up. Plaintiff inspected the cars to make sure the coupling was done in the usual manner (R. p. 12).

Neal Scovel, Gilbert Roudabush, Lavern Koch, Kenneth Dopp, Richard Cashen, Lloyd Bender, Percy Strong and Raymond Boyens were seated on either side of the motor car.

Plaintiff, Ralph Graves, Robert Stone, Fred Green, Vincent Kock and Lyle Homewood were seated on the push car, with plaintiff sitting on a water keg toward the rear end of the push car (Plaintiff's Ex. 4).

The push car had been located at Lamont for use by the section crew for approximately four or five years (R. p. 6). The worn condition of the wheels on the push car resulted in considerable side-sway and some up and down motion of the push car (R. pp. 6, 10; Sup. R. pp. 4, 11).

As the motor car and push car were operated over the main line, the motor car and push car jumped around, the push car jumping around more than the motor car, as they

struck the joints between each section of rail (Sup. R. pp. 4, 5).

Prior to the accident plaintiff on several occasions had complained to Albert Krausman, the roadmaster, and plaintiff's immediate supervisor, about the condition of the push car used at the time of the accident. He had asked Mr. Krausman to furnish him and his crew with a new push car. Mr. Krausman failed to comply with this request (R. p. 6; Sup. R. pp. 4, 11, 19).

Prior to the accident defendant had in service another type of car which was described as a trailer car. The trailer car was of the same dimensions as the push car, except that there were seats located on each side of the trailer car upon which the employees would sit, foot boards located below the seat upon which the employees could place their feet, and hand holds at either end of the trailer car, together with a hand hold running from the front to the back end of the car onto which the employees could hold (R. pp. 9, 10, 38; Sup. R. pp. 4, 10; Plaintiff's Ex. 5). Plaintiff had asked Mr. Krausman to furnish him with a trailer car for the purpose of transporting the men. Mr. Krausman likewise refused to comply with this request (R. p. 10).

As plaintiff and the other employees of defendant reached a point approximately two and a half miles east of Lamont, Graves, who was sitting on the east end of the push car, had extended his feet under him over to the hand hold on the motor car (Sup. R. p. 9). The motor car and push car parted as the result of the pin coming out of the draw bar and the push car coupler (R. p. 30; Sup. R. p. 9). The pin became dislodged as a result of the side to side and forward and backward motion of the push car (R. p. 10; Sup. R. p. 4; R. pp. 20, 21). As the push car and motor car parted, Graves fell forward (Sup. R. p. 9).

Plaintiff, hearing the commotion of the men who witnessed the predicament that Graves was then in, riding under the push car, holding onto the hand hold with his head between the push car and the motor car, got up from his seat on the water keg, moved toward the east end of the push car, and leaned forward to prevent the push car and motor car from drawing together (R. p. 8; Sup. R. pp. 3, 4, 6, 8). As plaintiff reached forward to prevent the push car and motor car from closing on Graves' head, F. N. Scovel, the operator of the motor car, applied power to the motor car to move it away from the push car (Sup. R. pp. 3, 6, 8). As this occurred, plaintiff lost his balance and fell from the east end of the push car, sustaining serious injuries (Sup. R. pp. 3, 6, 8).

Prior to the accident, on a number of occasions, plaintiff had warned Graves and the other men about putting their feet onto the motor car while sitting on the end of the push car. He did this because it was unsafe for an employee to ride in that position, and further, because it was a violation of Rule 27 of the defendant's rules (R. pp. 8, 9; Sup. R. p. 9).

Defendant failed to call any of its employees who were witnesses to the accident, although it had brought several of the employees from Lamont, Iowa, and placed them in the Lowry Hotel, St. Paul, Minnesota, during the trial (R. p. 42).

A jury of twelve heard all of the evidence and returned a verdict in favor of plaintiff. Thereafter, the Honorable Edward J. Devitt, Judge of the United States District Court, District of Minnesota, Third Division, denied defendant's motion for judgment notwithstanding the verdict or a new trial. On appeal to the United States Court of Appeals for the Eighth Circuit, the court, through the Honorable Archi-

bald K. Gardner, Chief Judge, affirmed the decision of the trial court. The evidence overwhelmingly preponderates in plaintiff's favor, and inasmuch as the sole question presented in the Petition for a Writ of Certiorari is the question of whether or not the United States Court of Appeals for the Eighth Circuit erred in affirming the lower court's denial of the motion for judgment notwithstanding the verdict, defendant's Petition for a Writ of Certiorari will be discussed from that standpoint alone.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The sole question presented in the Petition for a Writ of Certiorari is that petitioner is entitled to judgment as a matter of law. Defendant, in seeking the writ, claims that the decision is either in conflict with prior decisions of this Court, or in the alternative, is in conflict with prior decisions of the United States Court of Appeals for the Eighth Circuit.

The statement of facts heretofore set out contains a clear and concise statement of the evidence presented during the trial of the action, and, therefore, needs no reiteration. Plaintiff will consider the decisions of this Court and the United States Court of Appeals for the Eighth Circuit set forth in the Petition for a Writ of Certiorari.

A. The decisions of this Court are in complete accord with the decision in the instant case.

Defendant contends that the decision of the United States Court of Appeals for the Eighth Circuit is in conflict with the decisions of this Court contained in *Pennsylvania Railway Company v. Chamberlain* (1933), 288 U. S. 333, 77

L. Ed. 819, and *Moore v. Chesapeake & Ohio Railway Co.* (1951), 340 U. S. 573, 95 L. Ed. 547.

In the *Chamberlain* case, *supra*, plaintiff's decedent was riding a cut of cars in defendant's hump yard. It was claimed that as decedent was riding a string of cars defendant caused an additional string of cars to be kicked along the tracks and come in contact with the string of cars that decedent was riding. After the switching movement was completed decedent was found dead along the tracks. All of the witnesses who were in a position to observe what occurred testified that there had been no contact between the string of cars that decedent was riding and the string of cars coming up from the rear of the cut of cars that decedent was riding.

Testimony was introduced from one witness that he heard a collision between some cars in the yard and a short time later, looked around, and saw the rear string of cars coupled to the string of cars on which decedent was riding. This Court held that the evidence so overwhelmingly preponderated in favor of defendant that the minds of reasonable men could not disagree and, therefore, ordered judgment for defendant.

In the *Moore* case, *supra*, plaintiff's decedent was last seen standing on the footboard of a tender being moved by an engine. Thereafter decedent was found dead along the tracks of defendant railroad company. There was no evidence introduced to show how the accident occurred. Because of the complete failure of proof on the part of plaintiff this Court again ordered judgment for the defendant.

How can it possibly be claimed that there is any similarity between these two cases and the facts of the instant case?

As has been previously pointed out, the push car furnished to plaintiff and his crew was of a basically unsafe design and, further, was in a defective condition immediately prior to and at the time of the happening of the accident. The coupler used by defendant was such that would permit the pin or bolt to become dislodged by reason of the motion of the motor car and push car (R. pp. 6, 10; Sup. R. pp. 4, 11; R. pp. 21, 23).

Graves violated the verbal instruction from plaintiff, as well as one of defendant's written rules, in sitting as he did with his feet extended from the push car to the hand lift on the motor car (R. p. 9; Sup. R. pp. 7, 9).

Had defendant furnished plaintiff and his crew with a trailer car, the men would have been sitting in proper position with their feet resting on a foot board and presumably holding onto the hand holds furnished on the trailer car. If, while the employees were sitting on a trailer car, the pin became dislodged from the draw bar, the jury could find that the accident would not have occurred.

Further, had the push car been in a reasonably safe condition, with wheels furnished that were not worn and were in proper alignment, the jury could find that the pin would not have become dislodged from the draw bar.

Had pins been furnished that were secured with either a nut at the lower end of the pin or a spring type clamp device that would be open when the pin was in position and could be depressed in order to remove the pin from the draw bar, it would have been impossible for the pin or bolt to have worked its way out of position and to have become dislodged (R. pp. 21, 35).

Had Graves ridden in the position required by the rules and according to the instructions given him by plaintiff, the jury could find that he would not have been in such a position to lose his balance at the time the cars parted.

Substantial evidence was presented on each of the foregoing. Defendant had the means at hand to dispute any of these issues, if, in fact, the accident was caused in some other manner. At the trial the only evidence introduced by any of the witnesses who were present at the time the accident happened was from plaintiff. There were nine witnesses still in the employ of defendant who were present either on the motor car or push car at the time the accident occurred (Plaintiff's Ex. 4; R. p. 43). None of these witnesses were called by defendant to rebut or refute any evidence introduced by plaintiff.

In addition, defendant brought Graves, together with other employees, from Lamont, Iowa, and put them up in the Lowry Hotel, St. Paul, Minnesota, during the trial (R. p. 42). If Graves were riding in proper position immediately prior to the accident, it is inconceivable that defendant would have failed to call him and present this important testimony insofar as the theory of defense was concerned.

In addition, Graves certainly must have known whether the pin became dislodged from its position prior to the accident, as plaintiff contended. Again, if the pin became dislodged by Mr. Graves kicking it, as Mr. Krausman testified, from his "investigation" of the accident, is it conceivable that Graves would not have been placed on the witness stand by defendant to so testify (R. p. 30)? The sum and substance of defendant's failure to call any of its witnesses is that the evidence presented by plaintiff, either from witnesses to the accident or from expert witnesses testifying in plaintiff's behalf, was correct.

The decision of the United States Court of Appeals for the Eighth Circuit is in conformity with the recent decision of this Court contained in *Stone v. New York Cent. & St. L. R. Co.*, 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441;

Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; *Ellis v. Union Pacific*, 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572; and the very recent decision of this Court deciding a question of fact under the Jones Act (41 Stat. 1007, 46 U. S. C. §688, 46 U. S. C. A. §688). *Schulz v. Pennsylvania Railroad Company* (1956), — U. S. —, 76 S. Ct. 608, — L. Ed. —.

Defendant's first claimed reason for granting the Writ completely ignores the credible evidence introduced at the time of trial in an attempt to bring its distorted statement of facts within the holding of the *Chamberlain* case, *supra*, and the *Moore* case, *supra*.

B. The decision of the United States Court of Appeals for the Eighth Circuit is in accord with its previous decisions.

Apparently defendant has either misconstrued or failed to carefully read the decisions of the United States Court of Appeals for the Eighth Circuit set forth in its Petition for a Writ of Certiorari. Taking the decisions up in the order presented in defendant's Petition, we will first consider *Henwood, Trustee, v. Coburn, Adm.* (C. C. A. 8, 1948), 165 F. 2d 418.

One of the contentions made by the trustee was that the lower court erred in failing to direct a verdict in his favor. At page 421 of the decision the Court stated:

> "The court did not err in denying the trustee's motion for a directed verdict."

The lower court erred in failing to grant one of appellant's requested instructions and for that reason a new trial was granted. The decision is completely in accord with plaintiff's position in the instant case.

In *Chicago & Northwestern Railway Co. v. Garwood* (C. C. A. 8, 1948), 167 F. 2d 848, defendant railroad claimed that the lower court erred in failing to direct a verdict in its favor. At page 853 of the decision the Court stated:

> "We think the case was clearly one for the jury. On this question we must view the evidence and the inferences reasonably to be drawn therefrom in the light most favorable to appellee."

The case was sent back for a new trial because of the lower court's error in failing to grant one of appellant's requested instructions.

In *Chicago, St. Paul, Milwaukee and Omaha Railway v. Arnold* (C. C. A. 8, 1947), 160 F. 2d 1002, the Court stated at page 1005:

> "Under the evidence the question whether Arnold's injury resulted wholly or in part from the negligence of the railroad company or its employees, or solely from his failure to heed Kavanagh's warning and obey the order to get off the car, was clearly for the jury."

Each of the cases cited by defendant is in accord with the decision in the instant case.

CONCLUSION

Defendant has failed to set forth any ground upon which this Court should grant the Petition for a Writ of Certiorari and it is therefore respectfully submitted that the Petition should be denied.

Respectfully submitted,

A. HAROLD PETERSON,
Counsel for Respondent.

HVASS, WEISMAN, PETERSON,
KING & SCHWAPPACH,
Attorneys at Law,
615 Minnesota Federal Building,
Minneapolis, Minnesota.